UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

MENZIES MIDDLE
EAST AND AFRICA SA,

Petitioner,

v.

REPUBLIC OF NIGER,

Respondent.
_____/

Case No. 1:24-cv-00466 (ABJ)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITIONER'S MOTION FOR DEFAULT JUDGMENT AND CONFIRMATION OF ARBITRATION AWARD

PRELIMINARY STATEMENT

Petitioner MENZIES MIDDLE EAST AND AFRICA SA (hereinafter, "MMEA" or "Petitioner") by and through its undersigned attorneys, respectfully submits this memorandum of points and authorities in support of its Motion for Default Judgment and Confirmation of Arbitration Award (the "Motion") against the Republic of Niger ("Niger" or "Respondent"). The Respondent was served with the Petition to Confirm Arbitral Award on April 30, 2024 (the "Petition"). (Petition, ECF No. 1). Pursuant to 28 U.S.C. § 1608(d), Respondent had 60 days from the date of service to serve an answer or other responsive pleading. More than 60 days have elapsed since service was made and the Respondent has not filed or served an answer or other responsive pleading. Consequently, at MMEA's request, the Clerk of the Court entered default against Respondent on July 29, 2024. (Default, ECF No. 10). As discussed below and in the Petition, MMEA is entitled to relief on the merits. The Court, therefore, is respectfully requested

to enter default judgment pursuant to Rule 55(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 1608(e), and confirm the arbitration award.

FACTUAL BACKGROUND

MMEA brings this confirmation action against Respondent to recognize and confirm a final arbitration award issued on July 15, 2013, in ICSID Case No. ARB/11/11, in the matter styled *AHS Niger and Menzies Middle East and Africa SA v. The Republic Of Niger* (the "Award").[1]

I. THE UNDERLYING DISPUTE AND ARBITRATION

a. The Investment Agreement.

As detailed in the Petition, the Award arises from arbitration of a dispute regarding Niger's withdrawal, by Decree, of an approval granted to AHS Niger to provide ground handling services at Niamey International Airport and the termination of an Investment Agreement by the Respondent in December 2010 (the "Investment Agreement"). *See* Award ¶¶ 54-65.

The Investment Agreement and related approval stemmed from a December 2003, international tender for ground handling operations at Niger's airports, including the Niamey International Airport, launched by Niger following the bankruptcy of Air Afrique. *See* Award ¶¶ 39-40. The Menzies Aviation Group-AHS consortium submitted its technical and financial bids in January 2004. *See* Award ¶ 41. Between February 8 and 18, 2004, after the Minister of Transport of Niger declared the Menzies Aviation Group-AHS consortium bid successful, and in fulfillment of the requirements of tender, AHS and the Menzies Aviation Group incorporated AHS Niger, in

[1] A duly certified copy of the Award, including the incorporated and annexed Decision on Jurisdiction, was attached as **Exhibit 1** to the Petition's accompanying Declaration. Additionally, a duly certified translation of the Award into English was attached as **Exhibit 2** to the Petition's accompanying Declaration. *See* ECF No 1.

Niger. Petitioner, MMEA, held the majority (75%) of the shares in AHS Niger. *See* Award ¶¶ 43-44.

Thereafter, on February 19, 2004, ministerial decrees No. 015/MT/T/DAC and 016/MT/T/DAC, were issued, the former for ground-handling and self-handling services at Niger airports by a single service provider at the Niamey airport for a period of ten years, and the latter giving a renewable 10-year approval to Aviation Handling Services Niger S.A. (Menzies Aviation Group Partner) to provide ground handling services at Niamey's Diori Hamani international airport, including the handling of passengers, baggage, freight and mail, ramp operations, aircraft cleaning and servicing, line maintenance, flight operations, crew administration, air transport and catering services. *See* Award ¶¶ 45-46.

On December 15, 2004, AHS Niger and Niger entered into the Investment Agreement the purpose of which was to document the concession. *See* Award ¶ 47. In accordance with the terms of the specifications, AHS Niger applied for and obtained a ten-year operating license. *See* Award ¶ 48.

In January 2010, ministerial decree 016/MT/T/DAC, upon which the Investment Agreement was based, was amended by two government Decrees which reduced its approved duration from ten to five years, repealed earlier provisions, and modified the structure of the ground handling operations by increasing the number of service providers to three. *See* Award ¶ 54. The Ministry of Transportation informed AHS Niger of these changes and called on it to take the necessary measures to renew its license, which the Ministry claimed had expired in February 2009. *See* Award ¶ 55. AHS Niger continued to operate the ground handling service, and in March 2010, obtained renewal of its license for the 2010-211 period. *See* Award ¶ 57. In December 2010, further Decrees were adopted by Niger purporting to terminate the Investment Agreement,

invalidating the license and creating a new Ground Handling Unit at the Niamey airport. *See* Award ¶¶ 59-62.

Additionally, AHS Niger's records, materials, and equipment were illegally seized by the new Ground Handling Unit in violation of its ownership rights. *See* Award ¶¶ 63-65. Between 2010 and 2013 AHS Niger pursued remedies in the state courts of Niger that annulled a number of the offending Decrees. Niger appealed, and its appeal was dismissed, but these rulings failed to cause the reinstatement of the Investment Agreement or a return, even partial, of the expropriated assets. *See* Award ¶¶ 66-70.

b. The Arbitration.

The dispute was submitted to the International Center for the Settlement of Investment Disputes ("ICSID" or the "Centre") on March 11, 2011, on the basis of: (i) the Investment Agreement, (ii) the Investment Code of the Republic of Niger dated December 8, 1989, modified by ordinance in 1997, 1999 and by law in 2001 ("Investment Code"), and (iii) the ICSID Convention.

Niger challenged the Tribunal's jurisdiction under the ICSID Convention in its Memorial of April 6, 2011, claiming that (i) Niger had not consented in writing to an ICSID arbitration proceeding; (ii) AHS Niger was a Nigerien company and therefore not an "investor of another Contracting State" under Article 25 of the ICSID Convention; and (iii) MMEA was not a party to the Investment Agreement. *See* Award ¶ 86, Decision on Jurisdiction ¶ 78.

Niger subsequently ceased participating in the proceeding and was deemed to be in default under Article Rule 42 of the Arbitration Rules as of March 13, 2012. *See* Award ¶ 87. The Tribunal issued a Decision on Jurisdiction on March 13, 2012, upholding jurisdiction over the dispute and

claims under the Investment Agreement and the Investment Code. *See* Award ¶ 88, Decision on Jurisdiction ¶ 216.

By letter dated September 25, 2012, and in order to ensure that the Respondent had the complete file in the case, the Centre sent a hard copy of all correspondence exchanged in the file by e-mail since the beginning of 2012 to the Minister of Transport and State Litigations Department, copying in the Niger Embassy in Washington, DC, so that the latter could forward the file to the relevant departments of the State of Niger. *See* Award ¶ 24.

Subsequently, on July 15, 2013, the Tribunal rendered the Award, declaring that the termination of the Investment Agreement was "unfounded and irregular," that Niger had breached its undertakings under the Investment Agreement, and that Niger had failed to fulfill its obligations under the Investment Agreement and the Investment Code, and that, as a result, it is liable vis-à-vis AHS Niger and MMEA. *See* Award ¶¶ 119, 167.

The Tribunal found no "legal basis for the requisition of AHS Niger's assets, equipment and personnel" which persisted after the annulment of the termination by the state courts of Niger. *See* Award ¶ 125. Additionally, the Tribunal found that the requisitioning of AHS Niger's assets, equipment and personnel "had the effect of depriving the Claimants of control, ownership, use and enjoyment of their investment and therefore constitute[d] an expropriation contrary to the undertakings given by Niger in the Investment Agreement and the Investment Code." *See* Award ¶ 126.

The Tribunal ordered the Republic of Niger to pay damages in the amount of €4,641,592.15; ordered the Republic of Niger to pay the costs of the arbitration, including the costs and fees of the members of the Arbitral Tribunal and the ICSID costs; ordered the Republic of Niger to pay €118,000 in defense costs incurred by AHS Niger and MMEA; ordered the Republic

of Niger to pay simple interest on the amounts of the awards provided for in paragraphs 167.2, 167.3 and 167.4 at the annual marginal lending rate set by the European Central Bank (ECB) from the date of notification of the award (and from the notification by ICSID of the amount due with respect to the sums referred to in paragraph 167.3) until such sums are paid in full.[2] *See* Award ¶ 167.

II. RESPONDENT'S DEFAULT IN THIS ACTION

On February 19, 2024, MMEA timely filed this action seeking recognition and confirmation of the Award and entry of judgment upon the Award under 22 U.S.C. § 1650a and Article 54 of the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 17 U.S.T. 1270, 575 U.N.T.S. 159 (the "ICSID Convention"). On April 30, 2024, Respondent was served in accordance with 28 U.S.C. § 1608(a)(3). (Return of Service, ECF No. 8; FedEx Proof of Delivery, Attachment to Return of Service, ECF 8-1). Pursuant to 28 USC § 1608(d), Respondent had 60 days after service – until June 29, 2024 – to file and serve an answer or other responsive pleading. Respondent has failed to answer, defend or otherwise plead.

On July 18, 2024, MMEA requested that the Clerk of Court enter a default against Respondent pursuant to Rule 55(a) of the Federal Rules of Civil Procedure. (Request for Entry of Default, ECF No. 9). On July 29, 2024, the Clerk entered default against Respondent. (Clerk's Default, ECF No. 10). MMEA now requests that this Court enter default judgment against Respondent and confirm the Award pursuant to Rule 55(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 1608(e).

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[2] *See ECB Marginal Lending Facility rate as updated here:* https://www.ecb.europa.eu/stats/policy_and_exchange_rates/key_ecb_interest_rates/html/index.en.html

ARGUMENT

I. RESPONDENT WAS PROPERLY SERVED AND HAS DEFAULTED

Respondent was properly served pursuant to 28 U.S.C. § 1608(a)(3) and has failed to timely respond to the Petition. Respondent, Niger, is a foreign state within the meaning of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1330, 1602-1611. The FSIA provides a list of four methods by which service of process can be made on a foreign state. These methods must be considered sequentially:

> (1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or
>
> (2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or
>
> (3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or
>
> (4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

28 U.S.C. 1608(a).

Service under § 1608(a)(1) and (2) were unavailable in this action, because MMEA and Respondent do not have a "special arrangement for service" and Respondent is not a party to an applicable "international convention on service of judicial documents."[3]

MMEA served its Petition in accordance with § 1608(a)(3), which prescribes that "a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state," be sent "by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." 28 U.S.C. § 1608(a)(3). At MMEA's request, on April 1, 2024, the Clerk of Court sent a copy of the summons, Petition and supporting documents, and notice of suit together with a translation of each into French by FedEx to the Head of the Ministry of Foreign Affairs of Niger, which was delivered, and a signed receipt obtained. (Certificate of Mailing, ECF No. 7; FedEx Waybill, ECF No. 7-1). Service was effected on April 30, 2024. (Return of Service, ECF No. 8; FedEx Proof of Delivery, Attachment 1 to Proof of Service, ECF 8-1). Respondent was, therefore, properly served pursuant to 28 U.S.C. § 1608(a)(3).

Pursuant to 28 U.S.C. § 1608(d), foreign states have 60 days after service of process to serve an answer or other responsive pleading. Respondent was served on April 30, 2024. Its answer or responsive pleading was due no later than June 29, 2024. Respondent has failed to answer, defend or otherwise plead and has not appeared in this action. At MMEA's request, the Clerk of Court entered a default against Respondent under Rule 55(a) of the Federal Rules of Civil Procedure on July 29, 2024. (Default, ECF No. 10).

[3] U.S. Dep't of State, Bureau of Consular Affairs, Niger Judicial Assistance Information, https://travel.state.gov/content/travel/en/legal/Judicial-Assistance-Country-Information/Niger.html (last visited August 9, 2024) (Niger is not a party to the Hague Service Convention or the Inter-American Service Convention).

II. MMEA HAS A RIGHT TO RELIEF ON THE MERITS

a. This Court has Subject Matter Jurisdiction

This Court has subject-matter jurisdiction over this action under the FSIA. *See* 28 U.S.C. § 1330; 28 U.S.C. § 1605.

28 U.S.C. § 1330(a) grants federal district courts original jurisdiction over any civil action against a foreign state as to any claim for which the foreign state is not entitled to immunity under §§ 1605-1607 or under any applicable international agreement. This Court has subject matter jurisdiction under § 1330(a) because Respondent qualifies as a foreign state under 28 U.S.C. 1603(a) and is not immune from jurisdiction of this Court under at least two sovereign immunity exceptions.

First, Niger's accession to the ICSID Convention constitutes a waiver of immunity from an action to recognize an award governed by the ICSID Convention. *See* 28 U.S.C. § 1605(a)(1) (subject matter jurisdiction exists if a "foreign state has waived its immunity either explicitly or by implication").

Second, under 28 U.S.C. § 1605(a)(6), "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . to confirm an award" based on an agreement to arbitrate where "the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards." The ICSID Convention is such a treaty in force in the United States for the recognition and enforcement of arbitral awards. *See Blue Ridge Invs., L.L.C. v. Republic of Arg.*, 735 F.3d 72, 85 (2d Cir. 2013) ("To our knowledge, every court to consider whether awards issued pursuant to the ICSID Convention fall within the arbitral award exception to [foreign sovereign immunity under] the FSIA has concluded that they do."); *Tidewater*

Investment SRL et al. v. Bolivarian Republic of Venezuela, Civil Action No. 17-1457 (TJK), 2018 U.S. Dist. LEXIS 211469, 2018 WL 6605633, at *10 (D.D.C. Dec. 17, 2018) (recognizing *Blue Ridge Invs. L.L.C.* and finding Venezuela not entitled to immunity from ICSID award).

b. This Court has Personal Jurisdiction over Respondent

This Court has personal jurisdiction over Respondent pursuant to 28 U.S.C. § 1330(b), which provides that "[p]ersonal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title." 28 U.S.C. § 1330(b). The requirements for personal jurisdiction have been met as Respondent has been served pursuant to 28 U.S.C. § 1608(a)(3), and the district court has original jurisdiction pursuant to 28 U.S.C. § 1330(a).

c. The Award Should be Confirmed under the ICSID Convention

The United States and Niger are both Contracting Parties to the ICSID Convention. Article 54 of the ICSID Convention requires the United States to "recognize an award rendered pursuant to th[e] Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in [the United States]." ICSID Convention, art. 54(1). Article 54 further provides that, for Contracting States (such as the United States) with federal systems, ICSID awards may be enforced "in or through its federal courts," and may be treated "as if it were a final judgment of the courts of a constituent state." *Id.* Consequently, the implementing legislation for the ICSID Convention states that, "[t]he pecuniary obligations imposed by [an ICSID award] shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States." 22 U.S.C. § 1650a(a).

The legal standards governing judicial review of arbitration awards are "not complicated"—they are "limited by design." *Duke Energy Int'l Peru Invs. No. 1 Ltd. v. Republic of Peru*, 904 F. Supp. 2d 131, 133 (D.D.C. 2012) (citation omitted). Those standards are even narrower for awards issued pursuant to the ICSID Convention, which are not open to any collateral attack during enforcement proceedings.

Courts may only "examine the judgment's authenticity and enforce [its] obligations." *TECO Guat. Holdings, LLC v. Republic of Guat.*, Civil Action No. 17-102 (RDM), 2018 U.S. Dist. LEXIS 168518, 2018 WL 4705794, at *2 (D.D.C. Sept. 30, 2018) (citation omitted). They cannot examine its "merits, its compliance with international law, or the ICSID tribunal's jurisdiction to render the award." *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venez.*, 863 F.3d 96, 99-100, 117-20 (2d Cir. 2017). Courts are expected to "treat the award[s] as final," and award debtors cannot "make substantive challenges to the award" in enforcement proceedings. *Id.* at 118.

Furthermore, the Federal Arbitration Act and its various defenses do not apply to ICSID award enforcement. *See Tidewater Inv. SRL v. Bolivarian Republic of Venez.*, Civil Action No. 17-1457 (TJK), 2018 U.S. Dist. LEXIS 211469, 2018 WL 6605633, at *3-4 (D.D.C. Dec. 17, 2018). Accordingly, Niger is precluded from collaterally attacking the Award during these proceedings.

Additionally, Niger may not claim sovereign immunity under the FSIA. The FSIA creates "a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983). The standards include "a set of enumerated exceptions" to state immunity, "including, such as here, when a case is brought to 'confirm an award made pursuant to … an agreement to arbitrate' and the award is 'governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards.'" *Tidewater*, 2018 WL 6605633, at *10 (alteration

in original) (*quoting* 28 U.S.C. § 1605(a)(6)). The Award fits this FSIA exception, and Niger cannot escape confirmation and enforcement here.

Niger has also waived its foreign sovereign immunity in this action by acceding to the ICSID Convention. *See* 28 U.S.C. § 1605(a)(1) ("a foreign state shall not be immune from the jurisdiction of courts of the United States…in which the foreign state has waived its immunity either explicitly or by implication").

As a party to the ICSID Convention, Niger has agreed to abide by and comply with all awards against it. *See* ICSID Convention, arts. 53(1); 54(1). That very agreement necessarily contemplates "enforcement actions in other [Contracting] States," *Blue Ridge Invs.*, 735 F.3d at 84 (alteration in original) (citation omitted) and dispenses with any claim of sovereign immunity.

d. The Euro portion of the Award should be converted to United States Dollars at the rate of conversion in place on the date the Award was Rendered

The Euro portion of the Award, consisting of Award damages of €4,641,592.15 plus €118,000 in Award defense costs, plus interest in the amount of €345,010.41 from July 15, 2013 to December 31, 2023, should be converted from Euros to United States Dollars at the rate of exchange in place on July 15, 2013, the date the Award was rendered.[4] *See LLC Komstroy v. Republic of Moldova*, Civil Action No. 14-cv-01921 (CRC), 2019 U.S. Dist. LEXIS 143739, 2019 WL 3997385, at *43 (D.D.C. Aug. 23, 2019) (finding "cause of action to confirm the [Arbitral] Award arises under United States law, and thus the breach day—the date of the issuance of the [Arbitral] Award—dictates the exchange rate the Court must employ when converting the portion of the award in [Moldovan Lei] to Dollars.") (citation omitted); *see Cont'l Transfert Technique*

[4] The published rate of conversion on July 15, 2013, the date the Award was rendered is 1.3037919517136256 dollars for every 1 euro. https://www.xe.com/currencytables/?from=USD&date=2013-07-15#table-section

Ltd. v. Fed. Gov't of Nigeria, 932 F. Supp. 2d 153, 158 (D.D.C. 2013) ("Conversion of [] foreign currency amounts into dollars at judgment is the norm, rather than the exception."), *aff'd* 603 F. App'x 1 (D.C. Cir. 2015).

CONCLUSION

MMEA respectfully requests that the Court enter an Order and judgment thereupon against Respondent, the Republic of Niger, under Federal Rule of Civil Procedure 55(b) and 28 U.S.C. § 1608(e) and set out below:

i. Recognizing, confirming and enforcing the Award against the Republic of Niger in the same manner as a final judgment issued by a court of one of the several States;

ii. Entering a judgment upon the Order against Niger and in Petitioner's favor obligating Niger to pay the Petitioner damages and costs in the amount of $6,655,339.73 (consisting of €4,759,592.15 (consisting of Award damages of €4,641,592.15 plus €118,000 in Award defense costs), plus interest in the amount of €345,010.41 from July 15, 2013 to December 31, 2023, converted to USD at the rate of exchange in place on July 15, 2013, the date of the Award), the arbitration costs of $361,903.01, plus interest in the amount of $25,390.62 from October 8, 2013 to December 31, 2023, plus accrued interest on the damages and costs, including the arbitration costs, at the Marginal Lending Facility rate as established by the European Central Bank from January 1, 2024 until the date of the judgment;

iii. Awarding post-judgment interest at the rate applicable under 28 U.S.C. § 1961; and

iv. Granting such other and further relief as the Court deems just and proper.

Executed on: September 10, 2024

Respectfully submitted,

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